STATE OF MICHIGAN

COURT OF APPEALS

SOUTH COVE CONDO ASSN,

Plaintiff-Appellant,

v

DUNESCAPE @ NEW BUFFALO II, LTD,

Defendant-Appellee.

UNPUBLISHED
October 31, 2006

No. 270571
Berrien Circuit Court
LC No. 2005-002810-CZ

Before: Cavanagh, P.J., Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals the trial court's grant of summary disposition in defendant's favor. We reverse and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff South Cove Condominium Association is the owner of a parcel of land located in New Buffalo. The land forms the base of a peninsula located on what appears to be an inlet from Lake Michigan. Defendant Dunescape @ New Buffalo II, Ltd is the current owner of a parcel of land that forms the tip of the peninsula, accessible only through plaintiff's property. The instant appeal involves a dispute concerning the scope of an easement running over plaintiff's land.

On January 4, 1993, plaintiff's predecessor-in-interest and defendant's predecessor-in-interest entered into an agreement purporting to grant the grantees a 26-foot easement over the land currently occupied by plaintiff for ingress and egress and utilities. A road was established on the easement. Plaintiff maintains that, in February 1994, it was faced with a sinking road surface and problems with the utilities running underneath the road. It decided to repair the roadway and relocate the utilities next to the road, both to prevent future damage to them in the event of further sinking, and because the move was required by the township. Motivated, according to defendant, by a lack of funds, plaintiff decided to enter into an agreement with defendant's predecessor Norwest Bank Fort Wayne (Norwest). In return for $50,000, and other contested consideration discussed below, Norwest and its successors would receive the rights to hook into plaintiff's upgraded sewer line. This would apparently make the peninsula more marketable for future development. On February 8, 1994, Plaintiff and Norwest executed an "Agreement Ratifying and Modifying Easements". The document contains a recitation acknowledging the existing easement but stating that "it is in the best interests of both parties

that such easement rights be ratified and modified" as set forth in the document. The "Ratification of Easement" section of the new agreement contains the following pertinent language:

> South Cove hereby ratifies, and grants and declares unto Norwest, an easement across the "Easement Property", which is described on Exhibit B attached hereto. The easement shall be used in common by the parties for ingress and egress and utility services to and for the properties of the parties, including the South Cove Condominium, and the Norwest Property. The easement shall be used in common by the parties hereto and others entitled to the use thereof, and is for the benefit of the parties hereto, the properties of the parties, the co-owners of units in South Cove Condominiums, and their respective heirs, legal representatives, successors and assigns, and it shall run with the land.

Exhibit B of the new agreement did not contain a recitation of the legal description of the 26-foot-easement found in the initial easement grant. Rather, it contained the following:

> Easement Property
>
> For the purposes of ingress and egress to the Norwest Property, the easement property shall consist of the following:
>
> * * *
>
> 2. The existing roadway within the South Cove Condominium, commonly known as Harbor Isle Drive, the driving surface of which is approximately 14 feet in width, and which extends from the aforementioned access easement northerly adjacent to South Cove Units 40, 39, 38, 94, 93, 92, 91, 90, 68 through 73, 32 through 37, 74 through 89, 102 through 106, 184, 185, 160, 161, 162, 163, 200, and 196.
>
> For the purposes of utility services to the Norwest Property, and the installation, use, maintenance, etc. of such services, as provided for in Paragraph 3 of this Agreement, the easement parcel shall consist of the area described above, and shall also include contiguous property reasonably required to gain access to existing utility services (such as sanitary sewer lines and water mains) or for proper or appropriate installation of new utility services.

The new agreement also provided that Norwest could use the "roadway located on the Easement Property for the purpose of ingress and egress to the Norwest property" and that plaintiff would be responsible for repairing and restoring the roadway after the completion of its alterations. The agreement further provided that the Easement Property could be used for the installation of utilities, that plaintiff would complete specified work, including the installation of new water mains and sanitary sewer lines, and that the water and sewer lines would be extended into the boundaries of Norwest's property. Norwest was entitled to tap into the lines at any time in the future. Norwest agreed to pay plaintiff $50,000 at the completion of the work. The parties also agreed to share future maintenance of water and sewer lines once Norwest connected to the lines. The agreement also described how future maintenance costs of the roadway were also to be shared. In addition, the parties specifically agreed that, if any of the provisions in the new

agreement conflicted with "*any provisions in any other documents relating to the same subject matter*" the new provisions would prevail (emphasis added).

After the peninsula was transferred, defendant became interested in developing the land, but defendant was apparently concerned that it would not be allowed to pursue development because the existing road was too narrow. In July 2004, defendant contacted New Buffalo's city attorney and enclosed a "declaration of access rights form" indicating that it opined that it had a right to use the entire 26-foot easement for ingress and egress.

Plaintiff subsequently filed a complaint and sought declaratory and injunctive relief. It maintained that the new agreement limited Norwest, and defendant, to ingress and egress rights over only the 14-foot roadway surface. Defendant countered that it's ingress and egress rights remained over the entire 26 feet.

Both parties moved for summary disposition pursuant to MCR 2.116(C)(10). The trial court concluded that the agreement was unambiguous and did not restrict defendant's access to the entire 26-foot strip for use as an ingress and egress, and granted summary disposition to defendant.

We review de novo the trial court's resolution of a motion for summary disposition. *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 416; 668 NW2d 199 (2003). "[A] motion pursuant to MCR 2.116(C)(10) tests the factual support of a plaintiff's claim and is only appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." *Id*. at 417.

An easement is a limited property interest. It constitutes a right to use land burdened by the easement, rather than a right to occupy and possess the land. *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 379; 699 NW2d 272 (2005). When the plain language of an easement is unambiguous, it is enforced as written. *Id*. at 379-380; *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). "If the text of the easement is ambiguous, extrinsic evidence may be considered by the trial court in order to determine the scope of the easement." *Little*, *supra*. A contract is ambiguous if the words used may be reasonably understood in different ways. *Michigan Mut Ins Co v Dowell*, 204 Mich App 81, 87; 514 NW2d 185 (1994). The terms used are to be terms are to be taken and understood in their plain, ordinary, and popular sense. *Id*.; *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 355; 596 NW2d 190 (1999). An easement cannot be modified unilaterally by either party; however, it may be modified by mutual consent. See *Douglas v Jordan*, 232 Mich 283, 287; 205 NW 52 (1925); *Schadewald v Brule*, 225 Mich App 26, 36; 570 NW2d 788 (1997).

In the instant case, plaintiff argues that the trial court erred when it granted summary disposition in defendant's favor. It maintains that the trial court should have found that the new agreement language was unambiguous in its reduction of the size of defendant's ingress and egress rights. We agree.

After reading the agreement as a whole, we conclude that the trial court erred in its interpretation. If, as defendant suggests, the parties to the agreement actually contemplated that Norwest would have exactly the same rights of ingress and egress it had before the new agreement, Exhibit B would simply have reiterated the legal description in the older grant of

easement. The fact that the parties felt the necessity to lay out more specifically where Norwest could drive, and where it could lay its future utilities lines, indicate that they intended to modify Norwest's ingress and egress rights. We agree with the trial court that the parties could have, but did not, explicitly set out the fact that Norwest no longer had 26-feet of ingress and egress. However, the language in the agreement and in Exhibit B is clear. The recitals of the new agreement specifically state that Norwest easement rights would be modified. The "easement property" has been changed from the original grant. In addition, we note that the "conflict" language in paragraph 10 of the new agreement serves to override the earlier extent of Norwest's earlier ingress access.

We do not agree with the trial court that the parties' use of the term "existing roadway" and "driving surface" in Exhibit B indicates that they did not intend to alter Norwest's rights. This wording may be reasonably read to acknowledge that the existing roadway was to contain a driving surface and gutters. We find telling the fact that the language "commonly known as Harbor Isle Drive" is included in this description. This language strongly suggests that Norwest's ingress and egress access was to be limited to the paved portion of the road. Moreover, the diagram included as Exhibit C of the agreement clearly shows a fire hydrant next to the road, and the sewer line in the space adjacent to the brick paved surface underneath the concrete surface adjacent to the road. It is highly unlikely that the parties intended that Norwest or its successors would have ingress access over the hydrant. It is also unlikely that the parties contemplated that they would have to move the sewer line to give Norwest a larger ingress in the future, given that a main reason for the agreement was to put the sewer line where it was placed.

We conclude that, when read as a whole, the agreement unambiguously altered Norwest's easement rights over plaintiff's property. We thus reverse the trial court's decision and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens